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No. 85-694

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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I

QUESTIONS PRESENTED FOR REVIEW

1. What is the applicable rule for accrual of the six month limitation period governing hybrid breach of collective bargaining agreement/breach of duty of fair representation actions against an employer and a union.

2. Should the limitations provision for hybrid actions commence running before an employee discovers he has been injured as a result of the wrongful conduct of the union and his employer, prior to the time all the elements of his causes of action are present.

3. Should the vital objectives of federal labor law, such as fostering the private settlement of disputes, finality of dispute resolution and uniformity, which were relied upon determining the applicable limitation provision for hybrid actions, also be considered in determining the time for accrual of such actions.

4. Even though a hybrid action involves claims of wrongful conduct by both an employer and a union, should the rule for accrual of such an action be based solely on the point of discovery of only the union's breach of duties.

5. Should there be a uniform national rule for accrual of hybrid actions against a union and an employer, as there is a uniform national limitations provision, or may the accrual issue be resolved by looking to state law.

6. Under what circumstances is a genuine issue of fact raised as to the accrual and timeliness of a hybrid breach of collective bargaining agreement/breach of duty of fair representation action and were such circumstances present herein.

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No.

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Douglas A. Dowty, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its opinion and judgment entered by that court on August 9, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in Case No. 83-3621 (Appendix A1) is presently unreported, but has been recommended by the court for full text publication. The opinion of the United States District Court in Case No. C-3-82-005 (Appendix A10) has been reported. See *Dowty v. Pioneer Rural Elec. Coop., Inc.*, 573 F. Supp. 155 (S.D. Ohio 1983).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was rendered and entered on August 9, 1985 (Appendix A18). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Involved in this action are the following statutes which are reproduced in the Appendix at A20:

29 U.S.C. §160(b), setting forth the applicable statute of limitations (A21)

29 U.S.C. §185, pertaining to suits for violation of collective bargaining agreements (A21)

Ohio Revised Code §2711.08, mandating delivery of written arbitration awards to all parties in interest (A22)

The original disposition of the matter in the district court was made pursuant to Fed. R. Civ.P. 56(b) and (c), pertaining to motions for summary judgment (A22)

STATEMENT OF THE CASE

Petitioner, Douglas A. Dowty, commenced this action on January 8, 1982 claiming, *inter alia*, wrongful discharge by his employer, Pioneer Rural Electric Cooperative, in violation of a collective bargaining agreement and a breach of the duty of fair representation owed to him by his union, the Utility Workers Union of America. The case may be classified as a "hybrid" §301/fair representation action brought pursuant to the Labor-Management Relations Act,

29 U.S.C. §141 *et seq.* Federal court subject matter jurisdiction was invoked under 28 U.S.C. §185(a).

The factual beginning point herein is the formal arbitration of a grievance concerning petitioner's alleged violation of an "anti-moonlighting rule" promulgated some years after petitioner started a small business selling, servicing and installing electric generators. Petitioner was represented throughout the proceedings by representatives of respondent, union.

After the arbitration panel had reached its decision, petitioner was called to attend a meeting on July 7, 1981, involving three union officials, to discuss the case. The arbitration award (only) was read aloud at the meeting by one of the union officials. However, even though the award language appeared to indicate a different result, the union official incorrectly indicated to petitioner that notwithstanding the terms of the award, he was permitted to continue to sell, service and install electric generators. Further, a union official advised petitioner at the meeting that he would be receiving a copy of both the decision and award by certified mail as his notice of the results.

A few days after the meeting, petitioner received his copy of the arbitration decision and award. With the documents came a letter from his employer, respondent Pioneer, indicating, despite what he had been told by the union, that his position would be terminated in ten days unless he agreed to comply with the language of the award and cease all outside business activity. The instant action was commenced within six months from the day petitioner received the termination letter and his copy of the arbitration results, July 10, 1981, but one day over six months from the July 7, 1981 meeting.

Motions were filed in the district court by both respondents asserting the untimeliness of the action. The district court agreed, holding that under *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151 (1983) the six-month limitation period for bringing a hybrid §301 claim against an employer and breach of the duty of fair representation claim against a union commences to run when the employee knew or should have known about the union's breach of duties (A14). The appellate court, after extensively discussing whether it had jurisdiction given the filing of an early notice of appeal [without mentioning Fed. R. App. P. 4(a)(2)] adopted findings of the trial court and affirmed this dismissal.

The disposition of the instant case under the accrual rule selected by the lower courts, as will be developed, presents the Court with the opportunity to determine the proper standard under which the timeliness of a hybrid §301/fair representation action may be judged. Implicit in this opportunity is the foundation for this petition; whether the accrual rule adopted should reflect the policies expressed in the labor laws of this country and the previous decisions from this Court, a rule not isolated from the critical concerns arising in the ever expanding area of judicial and extrajudicial resolution of employee rights.

REASONS FOR GRANTING THE WRIT

I.

In *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151 (1983), this Court held that the applicable statute of limitations for hybrid actions against both an employer and a union should be the six-month limitation contained in §10(b) of the National Labor Relations Act, 29 U.S.C.

§160(b). The Court, however, has not issued a ruling on when the time limitation accrues, commences running, and at present the lower courts are establishing their own rules. In the instant case, the Sixth Circuit Court of Appeals held the limitation "begins to run in [sic] when the claimant knows or should have known of the union's alleged breach of its duty of fair representation. *Dowty v. Pioneer Rural Elec. Coop., Inc.*, No. 83-3621, slip op. at 7 (6th Cir. 9/9/85) (Appendix A8). The court rejected petitioner's position that the period of limitations should not commence running until he knew or should have known that he had been injured or damaged as a result of the wrongful conduct of the respondents.

Other circuit appellate courts, however, have held that the time of discovery of injury should be considered, at least implicitly recognizing that the element of injury is just as essential to a cause of action as a breach of a legal duty. The court in *Benson v. General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983) held that the employees' claims accrued and the six-month time period commenced running at the time they became aware of the injury complained of, a loss of seniority resulting from the alleged violations. The Eleventh Circuit's ruling in *Benson* was followed by the court in *Farr v. H.K. Porter Co., Inc.*, 727 F.2d 502 (5th Cir. 1984), which remanded the case for consideration of "factual questions such as when the 'injury' actually occurred and when the plaintiffs became aware of it for purposes of the statute of limitations." *Id.* at 506. In a pre-*DelCostello* decision the court in *Price v. S. Pac. Transp. Co.*, 586 F.2d 750 (9th Cir. 1978) held that the employee's fair representation cause of action accrued on the date his petition for reinstatement was denied, finding that no significant union action occurred after that date and that it was "the point at which any injury to

Price allegedly caused by the Union became fixed and reasonably certain." *Id.* at 754. This divergence in rulings merits review of this issue by this Court, particularly given the Court's customary concern for resolving whether there is a need for national uniformity on underlying issues of federal labor law. *DelCostello,* 462 U.S. at 162-3; *Autoworkers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 702 (1966).

II.

National uniformity is not the only concern this Court has considered in resolving limitation questions in the federal labor law area. Logically, if it was sufficiently critical to determine a single national rule as to the applicable limitations provision for hybrid actions given the goals of national labor law (as was accomplished in *DelCostello*), it should be equally imperative to consider the applicable rule for the accrual of hybrid actions given the same important goals. It is especially important for the Court to consider this issue in the case at bar as the accrual rule chosen by the lower courts, as well as their findings given the facts involved, bear no relation to the major objectives which this Court has relied upon in the past.

In *United Parcel Serv., Inc. v. Mitchell,* 451 U.S. 56 (1981), this Court held that the applicable limitations provision for §301 breach of collective bargaining agreement claims involving an employer only should be the typically short state statute governing the vacation of arbitration awards. Two years later in *DelCostello* the Court did not follow *Mitchell* in a hybrid action against *both* an employer and a union, finding that the analysis therein suffered "from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid §301/

fair representation litigation." *DelCostello,* 462 U.S. at 165. In concluding that state limitation provisions for vacating arbitration awards do not afford an employee a fair opportunity to preserve his hybrid remedies, the Court observed that a worker is usually unsophisticated in collective bargaining issues and may not be able to investigate his case and analyze his rights in such a short time. *Id.* at 165-6.

Precisely the same concerns are involved on the question of when the limitations period should commence. The Court in *DelCostello* recognized the effect that the time of accrual issue has on the plight of the employee in a footnote to the *DelCostello* opinion. In discussing the problems confronting an employee attempting to evaluate an unfavorable arbitration and the union's handling of the proceedings, the Court observed:

> Moreover, the difficulty of detecting and mustering evidence to show the union's breach of duty may be even greater in these situations, and it may not be an easy task to ascertain when the cause of action accrues—obviously a matter of great importance when the statute of limitation may be as short as 30 days. [as in *Mitchell*]

Id. at 166-7, n.16.

But the question of accrual goes beyond the short time an employee has to institute a hybrid §301/fair representation action, especially given the circumstances in the case at bar. Just as with the choice of the applicable limitations period, the choice of the appropriate time for accrual should reflect the primary goal of federal labor law, "the formation of the collective bargaining agreement and the private settlement of disputes under it." *Hoosier Cardinal,* 383 U.S. at 702. The rule chosen by

the courts below does not and where followed would have the same effect in every hybrid action.

The petitioner herein claims that he did not discover that he had been damaged until he received a written notice of termination from his employer, along with his copies, as promised, of both the arbitration award and decision. Before that time, petitioner had not discovered his injury because his union's representative had told him he could keep his job without having to cease his outside business activity. Petitioner pleaded with the lower courts not to adopt a rule starting the clock running at the time of discovery of the union's breach of duties, as such a rule mandates institution of a hybrid action regardless of whether the employee has been injured as a result; the court system becomes involved simply because the remedy must be preserved. A rule requiring the employee to sue before he is aware that he has been damaged is unjust, expensive, and flies in the face of the recurrently stressed theme of fostering the private, non-judicial resolution of labor disputes. *Hoosier Cardinal.* Nor does such a rule preserve the finality and integrity of such private settlements, also important labor law objectives. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976); *Mitchell*, 451 U.S. at 61, 70, n.7. A lawsuit of uncertain value is literally compelled.

Moreover, if the private system of resolving labor disputes is to be encouraged, certaintly the average worker must be given a fair incentive to support it. This Court has recognized that employee claims "lie at the heart of the grievance and arbitration machinery. . . ." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). Fundamental fairness dictates that an employee receive notice of all elements of his hybrid claim before he is required to file a lawsuit.

In particular, the issue was raised below as to whether an employee ought to be entitled to written notice of the results of the hearing of his grievance. Petitioner Dowty herein did attend a meeting with union officials where the arbitration award was read to him, but a union official orally contradicted the written mandate. Within the six-month period preceding the bringing of the instant action, however, petitioner did receive the written arbitration results for his private scrutiny, along with a termination letter from his employer, indicating that the oral representations given in the meeting had absolutely no validity.

Both lower courts herein though rejected petitioner's argument that he ought to be entitled to written notice of the results of his grievance. The Ohio statutes governing arbitrations mandate that written arbitration findings be delivered to each of the "parties in interest", so the district court held that the employee was not a "party in interest" to his own grievance. Ohio Rev. Code Ann. §2711.08 (Page 1981) (Appendix A22). See *Dowty*, 573 F. Supp. at 158 (Appendix A16) citing *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138 (S.D. Ohio 1982). This gives the worker no incentive to put his faith in the grievance system.

Other important considerations underlie petitioner's request that a requirement of written notice be scrutinized. Accrual of an employee's claims as of the date of service of written notice would fix the start of the limitations period with the highest degree of certainty. Requiring the union to provide the written arbitration findings to the employee avoids dissemination of inaccurate information and gives the union an incentive to comply with its duty of fair representation by adequately informing the employees it serves. This court has recently deter-

mined that requiring the union to pay its share of damages in a hybrid action encourages the union to fairly represent its members by processing justified grievances, the same logic applies here. *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983). Perhaps the need for such an incentive herein is confirmed by an observation made in the brief submitted on behalf of respondent, Utility Workers Union, in the Sixth Circuit:

> Given the simple fact that these actions often arise out of situations where an employee is not kept adequately informed of proceedings and their outcomes, the result would be, in the case at bar and in hundreds of similar cases, that the statute of limitations would be tolled for years . . . .

Brief of Respondent at 29.

A review of the harsh result in the instant case would afford the Court the opportunity, as in *Bowen*, to provide the union with an incentive to meet its duty, adequately inform the employees it exclusively represents, and avoid the perceived tolling problem raised in this quote.

III.

To this point, petitioner herein has advanced the need for this Court to establish a uniform, federal rule for accrual of hybrid §301/fair representation actions. The policies underlying federal labor law are best served, in petitioner's position, when the six-month limitation period commences to run on the date an employee learns that he has been injured as a result of the wrongful conduct of the union and employer, not as of the date of such conduct alone. However, in resolving the timeliness of federal causes of action, the Court has traditionally looked to state law. *DelCostello*, 462 U.S. at 158-9. It may well

be asserted by some that the accrual rule should pattern analogous state law, which, under the circumstances herein, would invoke the rule petitioner advances. See *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983). The time of discovery of injury controls in Ohio.

Should this Court accept jurisdiction and adopt the rule that a hybrid §301/fair representation action accrues when the employee knows or reasonably should have known that he has been damaged as a result of the breach of duties owed to him, the Court will also have the opportunity to review the facts regarding petitioner's knowledge and determine whether the lower courts erred in granting summary judgment to respondents. The record clearly demonstrates that at minimum a factual issue existed as to whether petitioner learned of his injury before he received a letter of termination from his employer on July 10, 1981. The instant action was instituted within six months from that date.

CONCLUSION

For all the foregoing reasons petitioner Douglas A. Dowty respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review that court's opinion and judgment.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed August 9, 1985)

No. 83-3621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS A. DOWTY,
Plaintiff-Appellant,

v.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., UTILITY WORKERS UNION OF AMERICA,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Before: MARTIN, CONTIE and WELLFORD, *Circuit Judges.*

PER CURIAM. Plaintiff, Douglas Dowty, brought a hybrid § 301/fair representation claim against defendants Pioneer Rural Electric Cooperative ("Pioneer"), its employees, and the Utility Workers Union of America (the "Union") after an arbitration decision that prohibited him from pursuing a separate private business on pain of discharge. The district court granted summary judgment in favor of the two defendants holding the action was time barred under *DelCostello v. International Brotherhood of*

Teamsters, 462 U.S. 151 (1983). We consider also whether this court has jurisdiction to hear the appeal.

Dowty worked as a lineman for Pioneer. While working for the company on a full-time basis, plaintiff "moonlighted" by selling and installing electrical generators. On September 15, 1980, Pioneer issued a rule which prohibited certain outside employment, including "any form of electrical work." This rule provided an employee the opportunity to cease the activity before being subject to discipline, which might include dismissal.

Shortly after issuing this rule Pioneer informed plaintiff that it would discharge him if he did not cease "moonlighting" in his electrical generator business. Dowty then initiated grievance procedures on November 30, 1980. Plaintiff was terminated for failing to discontinue his outside employment during 1981.

On May 15, 1981, a formal arbitration hearing was held following Dowty's grievance in accordance with the labor contract between Pioneer and defendant Union. The arbitration panel issued its award on June 24, 1981, which gave plaintiff ten days from the receipt of the award to discontinue his outside business as a condition to being reinstated without loss of seniority, but without back pay. Although not reflected in the award, the arbitration decision to which it was attached permitted plaintiff to continue selling the electrical generators, but did not permit him to continue installing or servicing them.

Edward Coggins, the Union's Regional Director, arranged for a July 7, 1981, meeting with plaintiff and two other union officials to discuss what the Union had done in representing Dowty and the status of the arbitration. Prior to the July 7th meeting, Coggins had contacted Harry Sworkin, [sic] the arbitration panel chairman, for a clari-

fication of the last paragraph in the award,[1] specifically to determine what plaintiff would be permitted to do in his outside employment. Coggins claimed that Dworkin indicated that plaintiff could continue to sell electrical generators and perform related work. Coggins, however, noted that at the July 7th meeting plaintiff was read the contents of the arbitration award and had actual knowledge of the Union's position with respect to that award. Plaintiff does not contest that he was made aware of the arbitration award contents at that time.

Plaintiff disputes Coggins' claim with respect to his advice about what plaintiff would be permitted to continue to do under the terms of the award. Dowty claims that at the meeting, Coggins advised him "that under the terms of the Arbitration Decision and Award, [he] could no longer perform any electrical wiring outside of [his] employment with [the Company]." This representation, if made, would not comport with the arbitration panel's decision and award.

At this meeting, Dowty was told that he would receive a copy of the decision and the award by certified mail. He received them on July 10, 1981, but it was not until January 8, 1982, that plaintiff filed his hybrid § 301/fair representation claim in district court.

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1. Paragraph IV of the Award states:

It is the judgment of a majority of the Board of Arbitration that the grievant be accorded an opportunity to determine within ten (10) days from the date of receipt of this Award whether he will agree to discontinue his outside business activity as a condition of being reinstated to his employment, without loss of seniority but without reimbursement for any incidental loss of earnings.

AWARD SIGNED, ISSUED AND DATED BY THE CHAIRMAN, AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 24th DAY OF JUNE, 1981.

Both Pioneer and the Union claimed that plaintiff's claims were barred by the applicable state statute of limitations. The Supreme Court, however, issued its *DelCostello* decision while this case was pending, and the Union (but not Pioneer) filed a memorandum with the district court contending that plaintiff's claims were barred by the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) adopted in *DelCostello*. Immediately after the Union filed its memorandum raising the *DelCostello* defense, Pioneer filed a similar motion.

The district court granted defendants' motions for summary judgment based on the claimed six months' limitation period holding that plaintiff had filed his action one day beyond the limitation period. The court held that the period began to accrue on July 7, 1981, the date of the meeting. The district court, however, noted that "The Court will order that judgment be entered in favor of the Defendants once Pioneer files a *verified* copy . . . of the collective bargaining agreement and the arbitration decision and award with the Court" (emphasis in original). The court's "first" decision was filed August 26, 1983, and plaintiff filed notice of appeal on September 6, 1983, ten days later. It was not until September 16, 1983, that the district court entered "final" judgment in favor of the defendants after receipt of the verified copies as specified in the August 26 order. The court noted in its September 16 order that "Plaintiff filed a Notice of Appeal on September 6, 1983, presumably from this Court's Decision and Entry of August 26, 1983, WHICH WAS NOT A FINAL ORDER. Plaintiff's counsel is urged . . . to file a supplemental Notice of Appeal indicating that the appeal, itself, is taken from the within Order rather than from the Decision of August 26, 1983" (capitalization in original).

Plaintiff, however, did not follow the court's recommendation and never filed a supplemental Notice of Appeal.

We first consider whether plaintiff has properly pursued his appeal to this court despite the fact that none of the parties have discussed this issue.

Plaintiff appealed from the district court's August 26 order, which that court itself characterized as an interlocutory order. Dowty did not follow the court's suggestion to file a supplemental notice of appeal following what the district court deemed to be its final order journalizing the entry of summary judgment in favor of defendants.

If the August 26, 1983, decision is deemed to be a final judgment despite the district court's characterization, then jurisdiction for the appeal lies under 28 U.S.C. § 1291; if it is not a final judgment, however, jurisdiction for this appeal would then have to be considered under 28 U.S.C. § 1292. (The district court never certified its August 26 order for appeal pursuant to § 1292(b).)

The Supreme Court in defining "finality" for purposes of the final judgment rule, has consistently held that an order which leaves nothing more than ministerial acts to be done and which otherwise ends the litigation on the merits meets the final judgment rule's requirements for jurisdiction to lie under 28 U.S.C. § 1291. *See, e.g., Catlin v. United States,* 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"); *Republic Natural Gas Company v. Oklahoma,* 334 U.S. 62, 67-69 (1948):

> the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all

> that needs to be adjudicated is the amount of damages . . . On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable.

See also, Cooper & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). *Brown Shoe Company v. United States*, 370 U.S. 294 (1962), also suggests that jurisdiction does lie for an appeal from the instant case. There the Court found jurisdiction present in an antitrust action in which the order appealed from had disposed of every request for relief in the complaint and required complete divestiture of a subsidiary even though the details of the divestiture had not been ruled upon. *Id.* at 306-11. The Court noted "A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." *Id.* at 306.

All that remained for defendants to do to conclude the proceedings under the August 26 order was to submit to the court verified copies of documents, copies of which had already been introduced into evidence. The district court clearly had already then determined the rights and obligations of the parties, and all that remained was the ministerial act of entry of final judgment in the court's records. We conclude under the circumstances that jurisdiction exists in this court to hear plaintiff's appeal.

Since we affirm the grant of summary judgment by the district court, we remand with instructions to enter final judgment *nunc pro tunc* in that court as of August 26, 1981, since the contents of the arbitration decision and award were then indisputedly known by all parties and the court.

As noted, plaintiff filed his complaint on January 8, 1982. If his cause of action accrued on July 7, 1981, when he learned of the arbitrator's award then the six month limitations period in § 10(b) time bars this action. *See Smith v. General Motors Corp.*, 747 F.2d 572 (6th Cir. 1984) (en banc). If, as claimed by plaintiffs, his action accrued on July 10 when he actually received the arbitration papers then the instant action is not time-barred.

Plaintiff's own affidavit introduced into evidence indicates that he learned of the actual contents of the arbitration panel's award on July 7 when he met with union officials to discuss the situation. He had actual knowledge then of the award regardless of what the union officials told him about discontinuing his "moonlighting." He also knew on July 7 what the union had done in pursuing his grievance to arbitration and that the union would no longer contest the award which adversely affected him.[2] There was no substantial factual controversy, then, concerning what plaintiff reasonably knew about the union's alleged breach of duty and the company's right to insist upon its rule limiting his outside business pursuits on July 7, 1981.

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2. In addition to that part of the award set out in footnote 1, it provided, in pertinent part:

> The Board of Arbitration finds and determines on the basis of the evidence adduced at the arbitration hearing, and consideration of documentary exhibits, and post hearing briefs, that the company's policy prohibiting certain types of "after-hours" work, or "moonlighting" on the part of its employees is reasonable, and within the recognized rights of management . . . .
>
> . . . the company's policy was orally communicated to the grievant in 1973 at the time he was hired, and that said policy was set forth in written form in 1977, ...
>
> The union is accorded the contractual right in each instance to challenge a plant rule, or policy unilaterally drafted by the company including the right to grieve the application of a rule . . . .

For purposes of a hybrid § 301/unfair representation action, the time the statute of limitations begins to run in [sic] when the claimant knows or should have known of the union's alleged breach of its duty of fair representation. *See Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984); *Metz v. Tootsie Roll Ind., Inc.*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 976 (1984); *Santos v. District Council*, 619 F.2d 963, 969 (2d Cir. 1980); *Shapiro v. Cook United, Inc.*, No. 83-3087, slip op. at 3 (6th Cir. 5/17/85) (per curiam); and *Northwest Ind. Credit Union v. Salisbury, et al.*, No. 84-1115 (6th Cir. 7/11/85) (unpublished per curiam).

Regardless of plaintiff's belief of what the arbitration award entailed, he claimed, essentially, that the Union had not adequately prepared and presented his position during the arbitration hearing. Dowty, however, knew of or learned about all the facts relating to the Union's preparation of his case by the July 7 meeting. Coggins' assertion was not contradicted that plaintiff had read the Union's post hearing brief several times. We find no error, then, in the determination by the district court:

> During the meeting held on [July 7, 1981], plaintiff learned of the arbitration panel's decision, read the hearing briefs of the union, . . . and was informed of the response of the union to the decision. At that time, he was also aware of the union's conduct during the grievance and arbitration procedure, including the fact that the union had refused to permit him to be represented by his own counsel. *By July 7, plaintiff was armed with all the facts with which he (or his attorney) needed to draft [¶ 23 in the complaint], which alleges that the union breached its duty of fair representation.* In short, by July 7, 1981, plaintiff

> "knew or reasonably should have known that" the union, in his opinion had breached its duty of fair representation.

(emphasis added).

We are not persuaded by plaintiff's argument that he cannot be deemed to have knowledge until he receives *formal* notice of the arbitrator's decision and award. Failure of an employee to receive a copy of an arbitration decision does not toll the running of limitations periods in § 301 actions when he knows what the union has done to represent his interests and essentially the disposition of his grievance. *See Brown v. Duff Truck Lines, Inc.*, 557 F. Supp. 194, 196 (S.D. Ohio 1983). To uphold plaintiff's contention, as the district court cogently noted, even if a claimant knew about the contents of an arbitration decision, his cause of action would never accrue if he never obtained a copy of the decision. We reject plaintiff's contention accordingly.

We affirm the judgment of the district court that the six month's limitation bars plaintiff's claims but remand for entry of the district court's final judgment as of August 26, 1981.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

(Filed August 26, 1983)

Case No. C-3-82-005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS A. DOWTY,
Plaintiff,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE INC., *et al.*,
Defendants.

DECISION AND ENTRY SUSTAINING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DEFENDANT UNION'S MOTION TO FILE MEMORANDUM SUSTAINED; MEMORANDUM DEEMED FILED; FURTHER PROCEDURES ORDERED OF COUNSEL FOR DEFENDANT PIONEER

Plaintiff brings this suit under §301 of the Labor Management Relations Act (LMRA) of 1947, 29 U.S.C. §185, against his former employer, Defendant Pioneer Rural Electric Company, Inc. (Pioneer), and his former union, the Utility Workers Union of America. Both Defendants have moved (Docs. #8 & 9) to dismiss or for summary judgment, on the ground that Plaintiff's lawsuit is barred by the applicable statute of limitations. This Court agrees with the Defendants and, for the reasons outlined below, sustains said motions.

I.

An examination of the record reveals the following facts. Plaintiff worked for Pioneer and was a member of the union. Pioneer and the union entered into a collective bargaining agreement, which contained a grievance procedure, culminating in final and binding arbitration. From 1973 until his termination in 1981, Plaintiff engaged in outside employment involving electrical work. On September 15, 1980, Pioneer issued Policy Rule 6-R, forbidding employees from engaging in certain types of outside employment; on November 7, 1980, it informed Plaintiff that it would dismiss him pursuant to the new rule. Plaintiff filed a grievance, in which the Union represented him. Pursuant to the procedure, an arbitration hearing was held on May 15, 1981. A three-member arbitration panel issued a decision and award on June 24, 1981. The panel denied the grievance challenging the validity of Rule 6-R, recommended that Plaintiff be given ten days to discontinue certain outside activities in conflict with Pioneer's business, but further stated that Plaintiff should be permitted to *sell* electrical generators, since that would not conflict with Pioneer's business. Decision at 15-16. These holdings, except for the very last, are reflected in the one-page "Award" issued with the decision.

The affidavit of a union official further reveals that Plaintiff attended a meeting on July 7, 1981, with three union officials, at which time Plaintiff was orally informed of the arbitration decision and award. Affidavit of Edward J. Coggins, Jr., attached to Doc. #24, at ¶¶8-14. (The Defendant Union has moved (Doc. #18) to file a supplemental reply memorandum, to which the Coggins affidavit is attached. This motion is sustained. Therefore, the Court has considered the Coggins affidavit in rendering its decision.) At that time, the recommendations of the

panel (reflected in the decision, but not fully in the award) were clarified in that Plaintiff "could continue to sell electrical generators and perform related work, such as servicing and installing electrical generators." ¶12. The officials told Plaintiff that the union would dissent from parts I and II of the award (upholding the validity of Rule 6-R), and concur in parts III and IV of the award (permitting the union to challenge the rule, and giving Plaintiff the opportunity to discontinue his outside activities in ten days). ¶13. Plaintiff was advised "to take his job back in accordance with the terms of the award." ¶14. Plaintiff does not directly contest any of the assertions set forth in the affidavit. However, he states that he was told at the July 7 meeting that he would receive a copy of the decision and award by certified mail (which he did on July 10). Affidavit of Douglas A. Dowty, ¶¶34, attached to Doc. #22. He also contends that Coggins misrepresented, at least in part, the recommendation of the arbitration panel, since their decision gave no option of continuing to "service and install" generators. ¶5.

Plaintiff filed this action on January 8, 1982, as a "hybrid" §301/fair representation lawsuit. In his complaint, he alleged that Pioneer breached the collective bargaining agreement through the promulgation and implementation of Rule 6-R. He also alleged that the Union breached its duty to fairly represent him in the grievance and arbitration procedure,

> by failing to adequately prepare and present plaintiff's position, by failing to offer or allow the assistance of counsel, by failing to object or waiving the objection to the appointment of a non-neutral arbitrator, by concurring in the arbitration award, by failing to further prosecute plaintiff's claim and by failing to take other actions necessary to protect the rights of plaintiff.

Complaint, ¶23.

II.

All the parties in this case have requested the Court to examine various materials outside the pleadings. Accordingly, it is proper to treat Defendants' pending motions as ones for summary judgment, under Fed. R. Civ. P. 56. Under Rule 56, Defendants' motions can only be sustained when the movants conclusively demonstrate, based on the pleadings, affidavits, and other material on record, that there exists no genuine issue of material fact, all evidence and inferences drawn therefrom having been construed in the light most favorable to the party opposing the motion. Fed. R. Civ. P. 56(c); *Board of Education v. Pico*, 102 S.Ct. 2799, 2806 (1982); *Atlas Concrete Pipe, Inc. v. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982).

As noted above, Defendants have moved on the basis that Plaintiff's action is barred by the applicable statute of limitations. The parties agree that the resolution of this issue is controlled by the Supreme Court's recent decision in *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983).[1] There, the Court held that "hybrid" §301 actions, such as this one, would be governed by the six-month limitations period found in §10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(b). *Id.* at 2285.

Since the within matter was filed on January 8, 1982, the limitations period must have begun running, at the latest, on July 8, 1981. In other words, Plaintiff's action must have accrued on or after July 8, 1981, to fall

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1. This Court has recently held that *DelCostello* should be applied retroactively, *i.e.*, to all "hybrid" §301 suits pending on the date of that decision. *See, McPeek v. Dayton Forging and Heat Treating Co.*, Case No. C-3-83-04 (S.D. Ohio Aug. ...., 1983).

within the six-month period.[2] The parties vigorously contest *when* this action accrued. Defendants argue that the action accrued on July 7, 1981, when Plaintiff learned of the arbitration award and decision. Plaintiff insists that the accrual date is July 10, 1981, when he received a copy of the arbitration award and decision by mail. While the issue is a very close one, the Court must agree with the Defendant.

This Court has recently observed that a §301 action accrues no later than the time when a Plaintiff "knew or reasonably should have known that [a breach of the duty of fair representation] had occurred, even if some possibility of nonjudicial enforcement remained." *Rose v. General Motors Corp.*, No. C-3-80-389 (S.D. Ohio Jan. 14, 1983), slip op. at 9-10 (*quoting, Santos v. District Council of New York City*, 619 F.2d 963, 969 (2d Cir. 1980)). *See also, Adkins v. General Motors Corp.*, No. C-3-82-011 (S.D. Ohio April 15, 1983), slip op. at 9-13, *appeal and cross-appeal docketed after entry of final judgment*, Nos. 83-3392, 83-3416 (6th Cir. June 14, 1983).[3]

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2. This assumes that the "six months" language from NLRA §10(b) is measured by six *calendar* months, not 180 days. If the latter measurement is used, then, according to the Court's calculations, this action was untimely filed no matter *which* accrual date is utilized (*see*, text, *infra*). If Defendants' date (July 7, 1981) is used, then the action was filed 185 days later; if Plaintiff's date (July 10, 1981) is used, then the action was filed 182 days later.

At least one court has held, without citing authority, that in a §301 suit, the six-month period of NLRA §10(b) is measured by 180 days. *Weller v. G.M.W.*, 548 F. Supp. 560, 562 (N.D. Ill. 1982). On the other hand, most courts seem to assume, without discussion, that §10(b) is measured by six calendar months. *See, e.g., NLRB v. R.L. Sweet Lumber Co.*, 515 F.2d 785, 787 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975). Given that the parties herein apparently assume that the latter measure is correct, the Court will follow the same course.

3. In *Rose, supra*, slip op. at 8 n.3 and *Adkins, supra*, slip op. at 10 n.6, this Court pointed out that the Sixth Circuit,

(Continued on following page)

Applying this test to the facts of this case indicates that the cause of action accrued on July 7, 1981. During the meeting held on that day, Plaintiff learned of the arbitration panel's decision, read the hearing briefs of the union, Coggins affidavit, ¶¶10-11, and was informed of the response of the union to the decision. At that time he was also aware of the union's conduct during the grievance and arbitration procedure, including the fact that the union had refused to permit him to be represented by his own counsel. Doc. #12. By July 7, Plaintiff was armed with all the facts with which he (or his attorney) needed to draft the paragraph in the complaint, quoted above, which alleges that the union breached its duty of fair representation. In short, by July 7, 1981, Plaintiff "knew or reasonably should have known that" the union, in his opinion, had breached its duty of fair representation.

In his memoranda, Plaintiff emphasizes that he did not receive "formal, official notice" of the arbitration decision and award until July 10, 1981, when he received a copy in the mail. Defendants appear to concede as much, but this is beside the point. There is no talismanic nature to Plaintiff receiving, or not receiving, "official" notice of the panel's decision and award. A review of the collective bargaining agreement herein indicates that only

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Footnote continued—

Echols v. Chrysler Corp., 633 F.2d 722, 725-26 (6th Cir. 1980), apparently views the accrual issue to be a matter of *state* law, while other circuits, *e.g.*, *Santos, supra*, 619 F.2d at 968, view it to be a *federal* issue. This disparity is of no consequence since Ohio law regarding accrual of actions is consistent with analogous federal law. *Rose, supra*, slip op. at 8-11. The Ohio Supreme Court's recent adoption of the "discovery" rule in several torts contexts, *e.g.*, *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E. 2d 438 (1983) (medical malpractice); *O'Stricker v. Walter Corp.*, 4 Ohio St. 3d 84, 447 N.E. 2d 727 (1983) (asbestos injury), only reinforces this conclusion.

the union and management are formal parties to the arbitration procedure. This Court has previously observed that only formal parties to the arbitration are required to be served with copies of the decision and award, Ohio Rev. Code Ann. §2711.13 (Page 1982), and that failure of the employee to receive a copy of the decision and award simply does not toll the running of limitations periods in §301 actions. *See, Brown v. Duff Truck Lines, Inc.*, 557 F. Supp. 194, 196 (S.D. Ohio 1983), *appeal docketed*, No. 83-3140 (6th Cir. March 1, 1983); *Hudson v. Teamsters Local Union No. 957*, 536 F. Supp. 1138, 1145 n.1 (S.D. Ohio 1982). Plaintiff did indeed receive a copy of the decision and award, apparently as a matter of course or practice. But nothing in the record indicates that same was required. Carrying Plaintiff's theory to its logical conclusion would yield the absurd result that, even if an employee otherwise knew of an arbitration decision, his §301 action would *never* accrue if he never received a copy of same, and he would possess an indefinite ability to file a §301 suit. *See, Brown, supra.* Thus, the Court is not convinced that there is even at least a "jury issue" (a genuine issue of a material fact) as to the date of Plaintiff's "actual notice," as Plaintiff argues, and holds that, on the facts of this case, the date of the "official" notice is irrelevant.

In addition, it appears that a union official at the July 7, 1981, meeting may have slightly misrepresented the nature of the award. As outlined above, the decision and award did not, in fact, permit Plaintiff to service and install electrical generators. Once again, however, this fact has little, if any, bearing on when the action accrued. The misrepresentation does not diminish the fund of knowledge developed by Plaintiff by July 7, 1981, which enabled him to know that the union breached

its duty of fair representation, as outlined in the allegations in his complaint.

The Court is aware that the result in this case may seem harsh. Given an accrual date of July 7, 1981, Plaintiff filed his suit only *one* day late. But the law must draw lines somewhere, and the interests served by the use of NLRA §10(b) as a limitations period in hybrid §301 cases (*i.e.*, the need for uniformity and the rapid resolution of labor disputes, *see, DelCostello,* 103 S.Ct. at 2292-94) would be thwarted if unjustified exceptions were made to the six-month period. To the extent equitable tolling is appropriate in a §301 action, *see, Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 708 (1966), the Court is unaware of any facts in the record which would justify tolling on this case, even for one day.

For all of these reasons, the Court holds that Plaintiff's cause of action accrued on July 7, 1981, and that his filing of suit on January 8, 1981, was untimely, and barred by the applicable statute of limitations.

III.

Based on the aforesaid, the Court sustains the pending motions for summary judgment. The Court will order that judgment be entered in favor of the Defendants once Pioneer files a *verified* copy, Rule 56(e), of the collective bargaining agreement and the arbitration decision and award with the Court, it appearing that the copies of said documents currently in the record are not verified. Counsel should file said documents within ten days after receipt of this entry. The Court will terminate the case upon its docket records once said materials are filed.

/s/ WALTER H. RICE
United States District Judge

JUDGMENT AND MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 9, 1985)

No. 83-3621

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOUGLAS A. DOWTY,
Plaintiff-Appellant,

v.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.; UTILITY WORKERS OF AMERICA,
Defendants-Appellees.

Before: MARTIN, CONTIE and WELLFORD, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed and the case is remanded for entry of the said District Court's final judgment of August 26, 1981.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as item-

ized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: September 3, 1985

A True Copy.

Attest:

/s/ GARY MCCARTHY
Deputy Clerk

29 U.S.C. §160(b)

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. §185

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

OHIO REVISED CODE

§ 2711.08 Award must be in writing.

The award made in an arbitration proceeding must be in writing and must be signed by a majority of the arbitrators. A true copy of such award without delay shall be delivered to each of the parties in interest. The parties to the arbitration agreement may designate therein the county in which the arbitration shall be held and the award made.

Fed. R. Civ. P. 56

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-694

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Does the Statute of Limitations in a hybrid §301/unfair representation action begin to run when the claimant knew or should have known of the union's alleged breach of its duty of fair representation?

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BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

STATEMENT OF THE CASE

Respondent, pursuant to Supreme Court Rule 34.2, will only supplement Petitioner's Statement of the Case in order to correct a material omission.

While Petitioner briefly sets forth the events that occurred at the July 7, 1981 meeting, Petitioner fails to include the fact that Petitioner learned of the actual contents of the arbitration panel's award on July 7, 1981, when he met with union officials. He knew at that time, despite whatever the union officials told him, that the award upheld the company's right to prohibit his "moonlighting" activities and gave him ten days to discontinue

such activities. He also knew, at that time, what the union had done in pursuing his grievance to arbitration and that the union was no longer going to contest the award that adversely affected him.

There can be no doubt that as of July 7, 1981, Petitioner had all facts upon which to file suit yet waited until the statute of limitations expired, albeit by one day.

SUMMARY OF ARGUMENT

Petitioner has failed to establish, by the criteria set forth in Supreme Court Rule 17, any basis for this Court's grant of certiorari. There is no significant conflict between the United States Courts of Appeals as to when the statute of limitations in a hybrid §301/unfair representation claim accrues. The rule that the statute accrues when the claimant knew or should have known of the union's alleged breach of its duty of fair representation was properly applied herein.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In this case, the Sixth Circuit Court of Appeals held that the statute of limitations for this hybrid §301/unfair representation case began to run "when the claimant knows or should have known of the union's alleged breach of its duty of fair representation." *Dowty v. Pioneer Rural Electric Coop., Inc.*, No. 83-3621 slip op. at 7 (6th Cir. 9/9/85) (Petitioner's Appendix A8). Petitioner appears to base his Petition for a Writ of Certiorari on an alleged conflict between the Courts of Appeals as to this accrual rule, when, in fact, no such conflict exists.

Given the unprecedented volume of Supreme Court Petitions for Writs of Certiorari, it is incumbent upon the Petitioner to meet one or more of the following criteria before the Court's discretionary review is invoked:

1. There must be existence of a true and significant conflict between the Federal Circuit Courts of Appeals;
2. A lower court has decided an important question of federal law that should be settled by the Supreme Court; or
3. The Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision."

Supreme Court Rule 17. Petitioner appears to assert that the first criteria, a conflict between the Federal Circuit Courts of Appeals is the basis for his request for discretionary review.

However, a review of the circuits establishes that the accrual test used by the Sixth Circuit is commonly applied by all the circuits and there exists no conflict, especially no significant conflict. *See C. L. Craft v. Automotive, Petroleum and Allied Industries Employees Union, Local 618*, 784 F.2d 800 (8th Cir. 1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Santos v. District Council of New York City*, 619 F.2d 963 (2nd Cir. 1980); *Scott v. Local 863, I.B.T.*, 725 F.2d 226 (6th Cir. 1984); *Russel-Newman Mfg. Co.*, 167 N.L.R.B. No. 156 (1968), *enf'd*, 406 F.2d 1280 (5th Cir. 1969); *NLRB v. Shawnee Industries, Inc.*, 333 F.2d 221 (10th Cir. 1964);

Metz-Tootsie Roll Ind., Inc., 715 F.2d 299 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984).

A review of these cases establishes that the universal rule for the accrual of statute of limitations is when petitioner knew or should have known that he was injured, i.e. knew or should have known of the union's alleged breach of its duty of fair representation. *Id.* A close examination of Petitioner's brief reveals that the relief Petitioner is actually praying for is a new accrual rule that would start the statutes of limitations upon receipt of the written arbitration award. Not only was this position rejected herein but was also rejected by the Eighth Circuit Court of Appeals in *C. L. Craft v. Automotive, Petroleum and Allied Industries Employees Union, Local 618, supra,* wherein the Court held that receipt of the written notice was irrelevant. Accrual in *C. L. Craft* occurred when the Plaintiff's grievance was finally rejected and he knew that his final contractual remedy, urging the union to strike, was denied. *Id. See also, Brown v. Duff Truck Lines, Inc.*, 557 F. Supp. 194, 196 (S.D. Ohio 1983).

In this case there existed no genuine issue of fact regarding Plaintiff's knowledge of the decision of the arbitrators. On July 7, 1981 he met with the union officials and learned of the actual contents of the arbitration panel's award, which included the fact that he had to discontinue "moonlighting" within 10 days as a condition of his reinstatement. He knew as of July 7, 1981 that the union would not contest this award. In spite of having all requisite knowledge by July 7, 1981 Petitioner waited until January 8, 1982 to file suit, which was one day after the statute of limitations. While the result herein may be harsh, as the district court observed, "the law must draw lines somewhere, and the interests served by the

use of the NLRA §10(b) as a limitations period in hybrid §301 cases (i.e. the need for uniformity and the rapid resolution of labor disputes, *see Del Costello*, 103 S. Ct. at 2292-94) would be thwarted if unjustified exceptions were made to the six months period." (Petitioner's Appendix at A17).

CONCLUSION

Petitioner has failed to prove that this case merits the discretionary Writ of Certiorari. He has failed to establish, pursuant to Supreme Court Rule 17, that there exists a true and significant conflict between the circuits regarding the accrual of the statute of limitations in hybrid §301/unfair representation actions. The Federal Circuit Courts of Appeals are in accord with their rulings that focus upon what the Plaintiff knew or should have known and the Courts that have considered requiring written notice have rejected that test.

Respondent prays that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 85-694 (3)

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,

Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., UTILITY WORKERS UNION OF AMERICA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Utility Workers Union of America, AFL-CIO, respectfully asks that the petitioner's request that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review its opinion and judgment be denied.

Statement of Case

The petitioner, Douglas A. Dowty ("Dowty") was employed by the respondent, Pioneer Rural Electric Cooperative, Inc. ("Pioneer"), and was a member of the respondent, Utility Workers Union of America, AFL-CIO ("Union"). The Union was and is the exclusive bargaining representative of certain employees of Pioneer which bargaining unit included Dowty. The Union and Pioneer entered into a collective bargaining agreement which provided, *inter alia*, for a grievance procedure culminating in final and binding arbitration.

On November 7, 1980, Pioneer informed Dowty that he would be dismissed for violating a company rule forbidding certain types of outside employment. A timely grievance was filed. The Union represented Dowty in grievance proceedings. On January 5, 1981, Ted L. Earl, Esq., advised the Union in writing that his firm had been retained by Dowty in the matter of Dowty's discharge. Mr. Earl offered to assist the Union in handling the grievance. The Union did not respond to this offer.

On May 15, 1981, an arbitration hearing was held. Dowty was present at the hearing and represented by a Union official. The case was heard by a three-member panel. On June 24, 1981, its chairman, a neutral arbitrator, issued an "Award of Arbitrator."

The neutral arbitrator ruled, *inter alia,* that Dowty should be given ten days to decide whether he would give up certain outside activities. If Dowty gave these up, then Pioneer would have to reinstate him without back pay.

On July 7, 1981, a meeting took place between Dowty and three Union officials. The decisions below all rest upon what transpired at this meeting. The Union has included the affidavits with supporting exhibits of Edward J. Coggins, Jr., Regional Director of the Union, and of Dowty as an appendix to this brief. On July 7th, Coggins read to Dowty the complete 17-page document labeled "Award of Arbitrator" with a final page labeled "Award." Coggins also read the post-hearing briefs of both parties to Dowty (A2). The "Award of Arbitrator" states that Dowty need not give up that part of his outside business activities which involve selling electrical generators (A19). However, part IV of the "Award" requires Dowty to agree to discontinue his "outside business activity" as a condition of reinstatement (A20-21). Coggins told Dowty that he had asked the neutral arbitrator to clarify this point and that the arbitrator felt that Dowty could continue to sell, install and service electric generators (A2). Dowty was also

told that the Union would concur in part IV of the "Award." Finally, Dowty was advised to take his job back under the terms of the "Award" (A3).

The affidavit of Dowty in no way disputes the essential elements of the affidavit of Coggins (A22). Dowty pointed out and the Union never disputed that Dowty did not receive a copy of the "Award" until July 10, 1981.

On January 8, 1982, Dowty filed a complaint setting forth a hybrid § 301/duty-of-fair-representation claim against Pioneer and the Union. The complaint alleged that the Union breached its duty of fair representation

> by failing to adequately prepare and present plaintiff's position, by failing to offer or allow the assistance of counsel, by failing to object or waiving the objection to the appointment of a non-neutral arbitrator, by concurring in the arbitration award, by failing to further prosecute plaintiff's claim and by failing to take other actions necessary to protect the rights of plaintiff.

Complaint, ¶ 23 (quoted in *Dowty v. Pioneer Rural Electric Cooperative, Inc.*, 573 F.Supp. 155, 157 [1983]).

The United States District Court for the Southern District of Ohio dismissed this complaint pursuant to the Supreme Court's decision in *Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983).

Reasons for Denying the Petition

Despite the lengthy list of rhetorical questions presented in the petition, this case hinges on two straightforward issues:

1. whether the rule adopted by the Sixth Circuit conforms to both federal labor policy and the rulings of other courts of appeals; and

2. whether the application of that rule was an abuse of discretion.

I.

The rule adopted by the Sixth Circuit conforms to federal labor policy and other circuit court decisions.

The Sixth Circuit held:

> For the purposes of a hybrid §301/unfair representation action, the time the statute of limitations begins to run is when the claimant knows or should have known of the union's alleged breach of its duty of fair representation.

Dowty v. Pioneer Rural Electric Cooperative Inc., 770 F.2d 52, 56 (6th Cir. 1985). The court relied upon its earlier decision in *Shapiro v. Cook United, Inc.*, 762 F.2d 49 (6th Cir. 1985) in which it decided to apply the general rule that the § 10(b) limitations period of the National Labor Relations Act begins to run when the claimant "discovers, or in the exercise of due diligence should have discovered the acts constituting the alleged violation." *Id.* at 51 (citing *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 [6th Cir. 1977]).

The rule adopted by the Sixth Circuit has been adopted by every court of appeals which has ruled on this issue of when a § 301/duty-of-fair-representation claim accrues. *Santos v. District Council of New York City*, 619 F.2d 963, 989 (2d Cir. 1980); *Scott v. Local 863, Int'l Bhd. of Teamsters*, 725 F.2d 226, 229 (3d Cir. 1984); *Farr v. H.K. Porter Co., Inc.*, 727 F.2d 502, 505 (5th Cir. 1984); *Metz v. Tootsie Roll Ind., Inc.*, 715 F.2d 299, 304 (7th Cir. 1983); *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 752 (9th Cir. 1978); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881 (11th Cir. 1985).

In his petition, Dowty claims that the decisions in *Benson v. General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983), *Farr v. H.K. Porter Co., Inc., supra,* and *Price v. Southern Pacific Transportation Co., supra,* all conflict with the Sixth Circuit's ruling in *Dowty*. Dowty seeks a

rule based on his discovery of the full extent of his injuries. This has never been the rule for an accrual of a cause of action in any forum. The cases relied upon by Dowty do not support his argument. In fact, these cases demonstrate the correctness of the Sixth Circuit's approach.

In *Price* the Ninth Circuit ruled that a duty-of-fair-representation claim accrued when an employer denied plaintiff's petition for reinstatement. The union took no action after that date. Therefore any injury to Price caused by the union's failure properly to represent him became "fixed and reasonably certain." *Id.* at 754. The decision does not imply that every possible injury must be known, only that plaintiff's injuries not be unduly speculative. *See also Archer v. Airline Pilots Ass'n Int'l*, 609 F.2d 934, 937 (9th Cir. 1979).

In *Benson*, the Eleventh Circuit held that the plaintiffs' action accrued when they became aware of their injury—to wit, a loss of seniority. *Benson v. General Motors Corp., supra*, at 864. However, the court went on to hold:

> For the purpose of determining when the §10(b) period begins to run, we look to when plaintiffs either were or should have been aware of the injury itself, not to when plaintiffs became aware of one of the injury's many manifestations.

Id. The court remanded the case for a determination as to when plaintiffs had or should have had knowledge of their loss of seniority. The court pointed out that this could have occurred when seniority lists were first posted. If such lists were in fact posted, then the claim would accrue with the posting, not with plaintiffs' layoff, and therefore was not brought within six months. *Id.*

The *Farr* court agreed with and adopted the ruling of the *Benson* court. *Farr v. H. K. Porter Co., Inc., supra*, at 505. The Fifth Circuit then remanded the case for findings as to when the injury occurred and plaintiffs became aware of it. *Id.* at 506.

The handling of the accrual issue in post-*Del Costello* cases by the circuit courts is in conformity with both federal labor policy and general federal policy regarding the accrual of claims. The general rule of accrual in federal cases is that a cause of action accrues when the plaintiff could first have successfully maintained a suit based on that cause of action. *Santos v. District Council of New York City, supra,* at 968-69; *Bell v. Aerodex, Inc.,* 473 F.2d 869, 873 (5th Cir. 1973). In a hybrid § 301/duty-of-fair-representation claim, this moment clearly occurs when the employee both knows (or reasonably should know) that the employer and union have injured him and when the employee has exhausted contractural or internal union remedies. *See Clayton v. U.A.W.,* 451 U.S. 679 (1981); *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

Dowty wants this Court to embellish this well-settled rule by requiring that the action doesn't accrue until the employee has received a copy of a written arbitration award *and* learns the full extent of his injuries. As to the latter, it should not be nor has it ever been the case that a plaintiff can delay bringing suit until every aspect of his injury is known. Nor has any plaintiff been turned away by a court for not knowing every aspect or potential manifestation of his injury. It has always been a general rule of law that an action accrues when an injury either occurs or is discovered. The full extent of the injury is an issue left to discovery and trial. This rule has been used successfully in the labor field as shown by the cases relied on by Dowty. *See Benson v. General Motors Corp., supra; Farr v. H.K. Porter Co., Inc., supra.* The liberal amendment provisions of the Federal Rules of Civil Procedure adequately protect plaintiffs who learn of another manifestation of their injuries after commencing an action.

Dowty suggests that the statute of limitations at least be tolled until an employee receives a copy of an arbitrator's decision. For the Court to adopt this requirement it will first have to reverse the main principle of its *Del Costello*

decision. *Del Costello* stands for nothing if not the doctrine that a uniform statute of limitations shall apply in all hybrid § 301/duty-of-fair-representation actions regardless of the underlying facts of those actions. In particular, the rule should not depend on the presence or absence of an arbitrator's award. *Del Costello v. Int'l Bhd. of Teamsters, supra,* at 154-55, 171-72.

Furthermore, the need for an employee to have a copy of the arbitrator's award is an issue which can be readily handled as an issue of fact within the framework of the accrual rule used by the Sixth Circuit. In a recent case, a district court was presented with just such an opportunity. An employee was injured by a successor employer's decision to place incumbent employees at the bottom of a seniority list. The union and employer arbitrated the issue without notifying the employee. The employee learned ten months later of the existence of the award but was unable to obtain a copy for another year and brought suit three months thereafter (25 months after the arbitration was held). *Katsaros v. Transit-Mix Concrete Corp.,* 585 F.Supp. 576, 578 (S.D.N.Y. 1984). The trial court held that Katsaros had knowledge of almost every element of his action when he learned of the decision. The court dismissed the complaint except for an allegation of union misconduct at the arbitration hearing itself. The plaintiff was given an opportunity to demonstrate that only by reviewing the written decision with an attorney could the employee know if the union's conduct at the hearing was improper. *Id.* at 579. *See also Craft v. Automotive, Petroleum & Allied Industries Employees Union, Local 618,* 754 F.2d 800, 803 (8th Cir. 1985) (*per curiam*) (fact plaintiff never received written award is irrelevant).

Finally, the imposition of a rule that every arbitrator's decision be in writing and given to an employee would effectively add a provision to the parties' collective bargaining agreement. National labor policy is designed to allow employees to select representatives and bargain in good

faith with their employers. The actual details of any agreement reached are outside the province of the courts and the Labor Board. This Court has made it plain that Congress never conferred upon the Labor Board or the courts such authority. In fact, reading such authority into the law would contradict the policy favoring the private resolution of disputes. *See H. K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970).

II.

The lower court's application of the accrual rule was not an abuse of discretion.

The decisions below can be summed up by saying that on July 7, 1981, Dowty would have had sufficient knowledge and would have been free of any legal barrier to sue the Union and Pioneer. The courts reached this conclusion by applying the standards set forth in Fed. R. Civ. Pro. 56(c), *Bd. of Education v. Pico,* 457 U.S. 853, 863 (1982) and *Atlas Concrete Pipe, Inc. v. Au & Son, Inc.,* 668 F.2d 905 (6th Cir. 1982). After placing Dowty's pleadings and proofs in the most favorable light, it was concluded that his claim accrued on July 7th.

By the end of the July 7th meeting, Dowty knew that an unfavorable arbitration award had been handed down. He also knew that the Union was concurring in the award. The Union advised Dowty to reclaim his job. Whether Dowty had to give up all or some of his outside activities is irrelevant to the issue of accrual of his action. What was important to the courts below is that on July 7th Dowty knew that he had to give up *some* outside income or forfeit his job. Dowty also knew that the Union was not going to challenge the award.

By July 7th Dowty also knew what steps the Union had taken in representing him, how the Union had conducted the hearing, what evidence or arguments considered important by Dowty were ignored by the Union and that the

Union had not allowed Dowty's attorney to take part in the proceedings. Thus, it was held below that every element in his complaint was known to Dowty on July 7th. *Dowty v. Pioneer Rural Electric Cooperative,* 573 F.Supp. at 158, *aff'd* 770 F.2d at 56-57.

As to the employer, Dowty had been out of work and off the payroll since early 1981. What more did Dowty need to know to discover that Pioneer had caused him an injury? The only bar to suing Pioneer earlier was the requirement that he first exhaust the grievance procedure. (The requirement of exhaustion of contractural remedies also, presumably, tolls the limitations period.) On July 7th the grievance procedure was exhausted. Nothing barred Dowty from commencing his action on July 8th.

Given this record, there is no question that the lower courts acted within their discretion in dismissing the complaint. There was no novel approach involved which warrants further review by the Supreme Court.

CONCLUSION

For all of the reasons set forth above, the Union asks that Dowty's petition be denied.

Respectfully submitted,

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DAVID STOLOW
On the Brief

AFFIDAVIT OF EDWARD J. COGGINS, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS A. DOWTY
Plaintiff

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., et al.
Defendants

CASE NO. C-3-82-005
(Judge Rice)

AFFIDAVIT

STATE OF OHIO
COUNTY OF MONTGOMERY, SS:

I, EDWARD J. COGGINS, JR., being first duly cautioned and sworn, deposes and says as follows:

1. I am the Regional Director, Region 3, of the Utility Workers of America and have served in that capacity since 1972.

2. As Regional Director, I occasionally become involved in the processing of grievances but do not become involved in all grievances.

3. Douglas A. Dowty has been a member of the Utility Workers Union, Local 469, since 1972, and was a member of the Union at all times relevant hereto.

4. On November 10, 1980, Dowty filed a grievance, protesting notice from his employer, Pioneer Rural Electric Cooperative, Inc., that he would be terminated from his position as Lineman Leader for engaging in outside or moonlighting activities in conflict with company policy.

5. Dowty was terminated by the company on December 12, 1980.

6. Pursuant to the terms of the collective bargaining agreement between the company and Local 469, Dowty's grievance was processed to arbitration. The arbitration hearing was conducted on April 15, 1981, before Harry J. Dworkin. I appeared at the arbitration hearing on behalf of Local 469.

7. On May 13, 1981, I submitted a Post Hearing Brief to Mr. Dworkin for and on behalf of Local 469.

8. On June 24, 1981, Mr. Dworkin issued an Award regarding Dowty's grievance, a copy of which was mailed to me. Upon receipt of Mr. Dworkin's Award, I contacted Gene Potter, who then contacted Dowty and Larry Rench, President of Local 469, and made arrangements for the four of us to meet on July 7, 1981.

9. Gene Potter, Larry Rench, Douglas Dowty and I met in Zanesville, Ohio, in my guest room at the Holiday Inn, at approximately 7:00 P.M.

10. During the meeting, I read the Post Hearing Brief of the company and discussed it with Dowty, Rench and Potter. I also read the Union's Post Hearing Brief and discussed it with the others.

11. During the meeting, Dowty informed me that he had read the Union's Post Hearing Brief several times. Dowty expressed the opinion that the arguments raised in the Union's brief should have yielded a favorable result to his grievance.

12. During the meeting, I also read the Arbitration Award of Mr. Dworkin and discussed the Award with Rench, Potter and Dowty. I advised Dowty that I had contacted Mr. Dworkin after receiving the Award for the purpose of obtaining a clarification of the last paragraph of the Award. I informed Dowty that Mr. Dworkin had indicated to me that he could continue to sell electrical generators and perform related work, such as servicing and installing electrical generators.

Affidavit of Edward J. Coggins, Jr.

13. During the discussion of the Arbitration Award at the meeting on the evening of July 7, 1981, the Union decided that it would dissent to I and II of the Arbitrator's Award and that it would concur in parts III and IV of the Award.

14. Based upon the discussion that was had, regarding the Arbitration Award, on the evening of July 7, 1981, I advised Dowty to take his job back in accordance with the terms of the Award.

15. As of July 7, 1981, Dowty had actual knowledge of the contents of the Arbitration Award, dated June 24, 1981, and had actual knowledge of the Union's position regarding that award, *i.e.*, that it would dissent from I and II of the Award, and would concur in III and IV. A true and accurate reproduction of the Arbitration Award is attached hereto as Exhibit "A-1".

Further affiant sayeth naught.

/s/ *Edward J. Coggins, Jr.*

EDWARD J. COGGINS, JR.

SWORN to before me and subscribed in my presence by the said EDWARD J. COGGINS, JR., this 1st day of July, 1983.

/s/ *Lessia K. Brandel*

NOTARY PUBLIC

LESSIA K. BRANDEL fka DEARTH, Notary Public
In and for the State of Ohio
My Commission Expires Nov. 24, 1986

EXHIBIT A-1, AWARD OF ARBITRATOR

AWARD OF ARBITRATOR

In the Matter of the Arbitration Between:

PIONEER RURAL ELECTRIC COOPERATIVE, INC., Piqua, Ohio

-and-

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL UNION NO. 469

BOARD OF ARBITRATION

HARRY J. DWORKIN, CHAIRMAN

ROBERT L. ROBERTS	GENE A. POTTER
Company Designated Member	Union Designated Member

APPEARANCES

ON BEHALF OF COMPANY

JOHN E. LYNCHESKI (Reed, Smith, Shaw & McClay)	Counsel for Company
ROBERT L. ROBERTS	General Manager
RANDY H. KYTE	Urbana Foreman
LEON FRANCIS	Piqua Operations Manager
EUGENE H. CARNEY	Urbana Operations Manager

ON BEHALF OF UNION

EDWARD J. COGGINS, JR.	Regional Director
LARRY F. RENCH	President, Local 469
HANK J. CIANCIOLO	Secretary
DOUGLAS A. DOWTY	Grievant (First Class Lineman)

THE ISSUE

TERMINATION OF EMPLOYMENT BY REASON OF OUTSIDE BUSINESS ACTIVITY CONSTITUTING CONFLICT OF INTEREST IN VIOLATION OF RULE;

WAS TERMINATION WARRANTED, AND CONSISTENT WITH JUST CAUSE?

Exhibit A-1, Award of Arbitrator

PRELIMINARY STATEMENT AND BACKGROUND:

The grievant held the job classification of First Class Lineman. In addition, he served as Group Leader. His seniority date is February 29, 1972. The grievant was terminated on December 12, 1980, after eight years of continuous service. The reason advanced by the company as justifying severance of the employment relationship was that the grievant had engaged in outside business activity, which included servicing customers of the company, which the company viewed as constituting conflict of interest in violation of an established Plant Rule.

The company has represented that an established company rule, and long existing policy prohibits employees from engaging in certain types of business activity after working hours which constituted a conflict of interest, and inconsistent with the legitimate interest of the employer.

The union challenges both the rule, and the manner of its application in the instant case. The grievance appealed to arbitration alleges that the grievant was improperly terminated, and that just cause was lacking, including the contention that the rule is unreasonable, was unilaterally promulgated, and lacks validity.

The employer is a relatively small operation with a total personnel of 50 people, 22 of whom are within the bargaining unit. The parties have had a continuous collective bargaining relationship for the past thirteen years, since 1967. The grievance before the Arbitrator is the first that has proceeded to arbitration.

Although the union has challenged the reasonableness of the rule, the application of which resulted in termination of the grievant's employment, the union does not dispute the fact that there are a set of policies, or plant rules drafted by the employer, and revised from time to time. The current set of Plant Rules were drafted, and made

effective September 25, 1980. The Plant Rule that prescribes restrictions on outside employment and activities is set forth in the "Policy Manual", under the subject "After Hours" Work for Another Employer or "Moonlighting". The text of the rule is as follows:

> PURPOSE:
>
> To provide an equitable, uniform policy to be followed by management in defining specifically certain moonlighting jobs which conflict with employment with the Cooperative, and to discourage employees from working extra jobs outside of their employment with the Cooperative.
>
> POLICY:
>
> The Board of Trustees explicitly discourages the working of additional or 'after hours' jobs by cooperative employees. Studies by industrial psychologists and other experts indicate that such 'after hours' work can and often does interfere with the safety, productivity, efficiency, attendance, and job satisfaction with the principal job.
>
> Moonlighting positions with any bank, savings and loan association, data processing company, answering service, etc., or any other company with which the cooperative does business is strictly forbidden.
>
> Working 'after hours' for financial gain for himself/-herself or oanother[sic] employer, in any form of electrical work, trenching or tree and brush clearing, is strictly forbidden.
>
> Any employee who decides to take an extra job is urged to consult with his/her immediate supervisor to explore the possibility of a conflict before accepting such position.
>
> Any employee found to be holding a second position or performing work in violation of this policy shall

first be given the opportunity to cease and desist such activity. If the employee continues to violate this policy after such opportunity to cease and desist is given, he/she shall be subject to appropriate discipline, which may include dismissal.

The policy restricting certain types of outside employment had previously existed in a somewhat modified form. Thus, the May 16, 1977 policy provided, in part, that:

M. Employees shall not participate in outside business or commercial activities or services which will interfere with or conflict with their performance of duties or adversely affect the public relations or image of said corporation.

The grievant is charged with having engaged in a business venture outside of his employment which included the sale of emergency electric generators to customers of the company, and to other members of the cooperative. The evidence indicates that the grievant had expanded his business activities so as to include the sale of material and electrical supplies to individuals who were also customers of the company. In addition, the grievant had undertaken contracting activities that included electrical wiring of homes and buildings, and installation of electrical equipment.

The company has represented that the grievant's outside activities had developed to a point where the company considered them in conflict with his employment as a First Class Lineman, and Group Leader, and that his activities were at variance with the company's interests, and in violation of its policy. The grievant's responsibility as Group Leader required that he exercise quasi-supervisory authority over Group Linemen in absence of a regular member of supervision. The grievant's normal hours of work during the Winter Season were 8:00 a.m. to

5:00 p.m., and 7:00 a.m. to 4:30 p.m. during the Summer Season. The grievant was subject to additional hours on a call-out basis when necessary to correct outages, which were by their very nature unpredictable.

The company represents that its policy restricting outside business activity is one of long standing. The company cites an instance on September 23, 1959, prior to advent of the union in which an employee, Harry Niece, performed insulation work, and installed an air conditioner for a customer of the cooperative. The company wrote to the employee on September 23, 1959, stating that:

* * *

> By your acting as an outside contractor you are placing Pioneer in an embarrassing position.
>
> The fact that househeating and insulation is so allied with Pioneers work will sooner or later get us into trouble. You must decide to be either an employee, or an outside contractor on your own. We are bound to have trouble as long as you work in a dual capacity. As soon as another contractor enters the field, or some member decides that Pioneer is actually selling househeating equipment we are going to be forced to ask you to decide which way you are going. Little things have come to me new that I don't like.

* * *

The grievant was similarly notified on October 14, 1980, after the extent, nature and scope of his outside business activities came to the attention of management. He was advised that he would be required to comply with the company's policy or, be subject to termination. The text of the October 14, 1980, letter is as follows:

> This will confirm our conversation of this morning which I informed you that, in my opinion, your present 'outside' employment activities are in violation of Pioneer Policy Bulletin No. 6-R, 'After Hours' Work for Another employer or 'Moonlighting.'

Please advise me how you intend to comply with the policy. I believe ten days would be a reasonable length of time to arrive at your decision. If I have not received your reply by October 27, 1980, I will assume you have decided to continue with your private electrical contracting business and will act accordingly.

On October 24, 1980, the grievant responded to the company's letter in which he expressed the desire to continue his employment with the Cooperative, but made no reference to his outside business activities.

The company thereupon on November 7, 1980, informed the grievant that his employment was being terminated effective December 12, 1980.

A grievance was filed on November 17, 1980, protesting the termination, and alleging that the action was not supported by just cause. The text of the grievance asserted that the company's policy was drawn up approximately seven years after the grievant had started his "moonlighting", and that "the local union is in complete disagreement with this policy."

APPLICABLE PROVISIONS OF AGREEMENT:

ARTICLE VII - SENIORITY

* * *

A complete loss of seniority will result when any employee:

* * *

3. Is discharged for proper cause.

* * *

ARTICLE IX - GRIEVANCE AND ARBITRATION PROCEDURE

* * *

Both parties, the Union and Management, agree it is not the intent of either party to deliberately withhold pertinent information in grievance discussions in the

primary steps with the purpose of later bringing said information up in the final step of arbitration.

* * *

ARTICLE X - RIGHTS OF MANAGEMENT

The management of the Cooperative shall have the direction and control of the property and operations, and the composition, assignment, direction and determination of the size of working forces belong to, reside in and shall be controlled by the Cooperative, provided that these rights shall not be exercised for the purpose of unjust discrimination against any employee, or to avoid any of the provisions of this agreement.

POSITION OF EMPLOYER:

The company points out that its policy restricting certain types of outside employment, and activities that present a conflict of interest is reasonable, has been in effect since at least 1967, and has been uniformly enforced. The company represents that when employees are hired they are specifically instructed that the company's policy precludes inconsistent employment, and are made aware of the consequences that would follow in event an employee should refuse to discontinue such business activities.

The company reasons that the policy, and the purpose designed to be achieved are reasonable, directly related to the company's operations, and is warranted under the reserved rights principle, as appears in the contract, (Article X - Management Rights).

Testimony was adduced through Robert L. Roberts, General Manager, who has been with the Cooperative for some twenty-one years, fourteen of which have been as General Manager. He testified that the Cooperative is owned by some 11,000 member-consumers, that it is organized as a non-profit cooperative; its principal business consists of providing residents of three counties with

electrical power. The Cooperative is governed by a Board of Trustees who are charged with formulating operating policies and regulations. There are some twenty-seven (27) similar cooperatives in the State of Ohio, Pioneer being the second largest.

The company acknowledges that when the grievant was hired, in 1973, the policy had not been reduced to written form, and was orally communicated to the grievant. As regards the history of the policy, it was first promulgated in oral form several years prior to advent of the union. The policy was deemed warranted by reason of situations that had developed of Cooperative employees being engaged in electrical activity, and various types of construction work in direct competition with the employer, and in conflict with its legitimate interests. The purpose of the policy was to avoid, and guard against conflicts, or potential conflicts with the business of the employer, including the need to enhance the Cooperative's image, and assure continued good public relations with its customers.

Claims were advanced by the Cooperative that, in a number of instances the outside activities of certain of its employees were identical to the normal business activities of the Cooperative. Additionally, it is represented that where an employee works a full schedule of hours, in event he thereafter engages in extensive business activities on his own time it tends to diminish the employee's physical capabilities, and restricts his availability to correct outages.

The Cooperative assured the Board of Arbitration, and members of the union that it has no intention of barring all moonlighting, or outside business activities on the part of its employees. The policy is designed to apply so as to limit and discourage outside activities which clearly confict with the employer's business interests and functions.

The company represents that the grievant was fully informed of the policy prohibiting certain types of outside activities as of the date of his hire which was February 29, 1972. Thereafter, on May 16, 1977, the policy was set forth in written form, and distributed among all employees.

As regards the grievant's outside activities evidence was adduced that, commencing with the year 1979, he engaged in the electrical contracting business and for a time had opened a store in St. Paris, Ohio, which was closed after some two months. Among the activities that were documented by the company were various jobs performed by the grievant in the nature of electrical contracting services. The grievant had purchased a line truck, and hired at least one employee. Evidence was adduced that on one occasion the grievant contracted to install cross-arms on light poles that had been sold, and installed by the Cooperative for an athletic field of the Graham Consolidated School, which the company represented clearly presented a conflict of business interest, and caused confusion. In addition, the grievant sells generators to persons who are members of the Cooperative. He also had contracted for various types of electrical wiring within the geographical areas served by the Cooperative. The Cooperative asserts that the grievant's outside business interests overlapped in many instances the work normally performed by the Cooperative.

Upon assessing, and evaluating the full scope of the grievant's outside business interests members of management confronted the grievant with the information that had been gathered, and reviewed with him the policy restricting certain types of outside activity. The grievant responded that he was unaware of the company's policy, and asserted further that the policy had been promulgated after the grievant was hired, and thereupon was not applicable to him. The grievant was given the option of discontinuing his outside business activities, or severing

his employment with the company which action was taken upon the grievant's failure to give assurance that he would comply with the policy.

POSITION OF UNION:

The union maintains that the company acted improperly, and in violation of the contractual rights of bargaining unit employees when it decided to terminate the grievant's employment following his refusal to accede to the employer's request that he discontinue his outside business activities. As indicated in the text of the grievance the union challenges both the company's action in terminating the grievant's employment, and validity of the policy on the ground that it was unilaterally formulated without negotiation with the union, and that the policy is arbitrary, and unreasonable.

The union has made it clear that it does not challenge the employer's right to establish reasonable rules and regulations; however, the authority contained in Article X - Rights of Management, is expressly made subject to, and governed by the company's obligation to assure that the company's rules and regulations are in all respects consistent with the agreement, and that it will avoid "unjust discrimination against any employee."

The union concedes that since approximately 1973, the grievant has been engaged in contracting activities, including wiring of domestic, and commercial buildings, sale of electrical generators, and electrical supplies. The grievant acknowledged also that he advertises his contracting business in local newspapers, and radio stations. Such advertise ments have also appeared in "Country Living" which is a house organ published by the Rural Electrical Cooperative Association of which Pioneer is a member, and therefore, had full knowledge of the nature of the grievant's outside business activities. The grievant's advertisement in this

publication related to the sale of emergency generator equipment.

The grievant testified that he was totally unaware of the company's policy restricting employees from engaging in outside activities until some time in September, 1980. Further, the grievant was hired in 1972, at which time there was no written policy, and the grievant did not consider himself to be bound by a "subsequently established" policy.

The grievant on cross-examination acknowledged that a substantial part of his electrical contracting business has been with both members, and customers of Pioneer Co-operative. The grievant admitted that on two occasions he used his employer's line truck without permission in performing private electrical work on the premises of one of Pioneer's customers, which work involved crimping, and installation of a generator.

The grievant represented that his electrical contracting business is quite limited in scope; that he at no time had more than one employee, who was let go in March, 1980. The grievant had purchased a line truck which he uses in digging and setting holes incidental to electrical work which he performs for customers.

The union urges that the termination of the grievant's employment under the circumstances here present was unwarranted, and not for just cause. The action taken by the employer was inappropriate, and in violation of the security clauses of the Collective Bargaining Agreement. Employees are entitled under both the express, and implied terms and conditions appearing in the agreement, to be secure in their employment except where discipline, or termination is warranted for reasons constituting just cause. The union reasons that:

Discipline is a very serious matter and in a discipline case the initial burden is on the Company to prove that the Grievant misconducted himself in a manner warranting discipline. Surely, the Management's after-the-fact endeavor to rationalize their inappropriate action cannot be condoned. Not once, in the Grievant's entire course of employment was he ever reprimanded for his work performance. To the contrary, prior to the instant matter, the Grievant has been praised.

Corrective discipline requires patience of supervision and requires that employees be dealt with fairly and objectively. Further, corrective discipline presupposes that the primary purpose of punishment is to correct wrongdoing rather than wreak vengeance on an employee. Management must give consideration to reasonableness and practicability in the exercise of its disciplinary powers. (Union Brief, p. 7)

FINDINGS AND OPINION OF CHAIRMAN:

The evidence adduced at the arbitration hearing established that the grievant was an employee of Pioneer with some eight years of service. The grievant had a satisfactory employment record throughout his period of employment. In addition, he was given the additional responsibility of Lineman Group Leader, in absence of the regular supervisor.

It is a well established principle, and within the scope of the management rights clause as set forth in Article X that, an employer is vested with the right to draft, and promulgate reasonable rules and regulations designed to govern its operations, and control the activities of its employees, including rules relating to work procedure, and extending to a more limited degree to outside activities that appear to be directly related to work performed on behalf of the employer. The reasonableness of a particular

rule, and its application, are at all times subject to challenge by the union, or an affected employee through the grievance procedure, including appeal to arbitration as is here the case. Thus, although Plant Rules are unilaterally established and not subject to negotiation, they are to be observed by employees subject to the rules, with the right to grieve in event a rule appears to be unreasonable or arbitrary, or, in event the rule is enforced in a manner that would constitute discrimination, deprivation of a right or benefit of a contractural nature, or that may result in disciplinary action unsupported by just cause.

The issue with which the Board is here concerned relates to the content and application of the employer's policy, which since 1977 has been set forth in written form, and revised on September 25, 1980. The company's policy prohibits "moonlighting", or, "after hours" work for another employer, and restricts outside activities that are deemed inconsistent with the employer's interests. The text of the policy refers specifically to "certain moonlighting jobs which conflict with employment with the Cooperative". It is apparent that the policy is not intended as a blanket prohibition, or restriction on all forms of outside employment, or business activity. The policy is designed to deal with only such outside activities as constitute a conflict of interest, or which directly compete with the employer's business, and involve its members, or customers. The policy appears to constitute a restatement of the principle that one cannot simultaneously serve two masters, and that a measure of loyalty is an indispensable prerequisite to the employment relationship.

The evidence adduced before the Board of Arbitration establishes that the rule prohibiting certain types of outside business activities is reasonable, and designed to safeguard and protect the legitimate interests of the employer against

outside, competitive business activities on the part of employees of the Cooperative. The rule is based on the premise that certain types of after hours work can and often does "interfere with the safety, productivity, efficiency, attendance and job satisfaction with the principal job." Further, that portion of the policy that prohibits engaging in business activity with members, or customers of the Cooperative is well within the legitimate right of management to protect its operations, such rule would particularly apply to after hours work involving installation of electrical equipment, wiring, and similar activities that are customarily and normally performed by the Cooperative. One instance was cited in which the grievant used a company vehicle and crew to perform private electrical work on company time.

The policy does not prohibit every form of outside activity, but only such as are of the same character as performed by the Employer. Employees who engage in such outside employment are accorded an opportunity to consult with their supervisor so as to determine whether a conflict of interest is likely to exist. Finally, an employee is not summarily discharged even where it is determined that his outside employment presents a conflict of interest in violation of the policy. Pursuant to the rules the employee is accorded "the opportunity to cease and desist such activity"; termination results only in event the employee refuses to discontinue his competitive employment. In short, he is given the choice of working for his employer, or, pursuing his outside interests.

The evidence in the instant case establishes by a clear preponderance that the grievant did, and continues to engage in the electrical contracting business outside of his employment which activities are within the purview of after hours work that is prohibited by the rule. As examination of the work performed by the grievant on his own

time clearly establishes that it is in direct competition with the business of grievant's employer.

The evidence indicates further that suppliers, and salesmen have had occasion to inquire of the Cooperative concerning purchases made by the grievant, and requesting payment. Thus, persons dealing with the grievant appeared to be uncertain whether the grievant was acting on his own behalf as an entrepreneur, or, as an employee and agent for the Cooperative. It is reasonable to assume that such confusion would result, including the Cooperative's relationship with the grievant. In one instance a supplier of generators, who was also a Cooperative member, and customer lodged a complaint that the grievant had become delinquent in paying for electrical supplies that he had purchased, and that the supplier contemplated pursuing legal action.

The evidence indicates that Pioneer's customers may frequently make inquiries of linemen in the field concerning their electrical needs, and solicit suggestions as regard electrical problems. In such instances, it may reasonably inferred that the lineman's response to the customer may be affected by the employee's outside business interests, thereby presenting a real, or potential conflict which the employer would be warranted in seeking to guard against.

There is ample evidence to warrant the conclusion that the grievant's outside electrical contracting business of the scope revealed at the arbitration hearing would constitute a case of dual loyalty, and conflict of interest which the policy is designed to restrict. The Chairman notes further that the company's policy is not in such form as to constitute a blanket prohibition against all types of outside activity, but only such as overlap the company's customary business functions. Several of the company's employees engage in various types of after hours work, such as raising bees, farming, and other types of outside jobs

which are not considered in conflict with the company's operations.

The Chairman notes further that the policy does not mandate termination of employment immediately upon disclosure that an employee is conducting an outside business in conflict with the interest of the employer. The policy commendably accords the employee an opportunity to decide whether to continue his outside work, or remain with the company. Should an employee refuse to "cease and desist" from his outside employment, he may be subject to appropriate discipline, which may include dismissal, but does not mandate dismissal in all cases.

In light of all of the attendant circumstances, including the grievant's relatively long tenure of service, and otherwise satisfactory work record, it is the recommendation, and award of the Chairman that the grievant be accorded the option of discontinuing his outside business activities within ten (10) days of receipt of the Award, in which event he shall be reinstated to his employment without loss of seniority, but without any reimbursement for lost earnings.

However, inasmuch as the grievant had been engaged in selling electrical generators since approximately 1975, with full knowledge of members of management it would not appear that continuation of such sales would be deemed in conflict with the company's interests, nor within the activities that are "strictly prohibited" under the policy.

Respectfully submitted,

/s/ Harry J. Dworkin

HARRY J. DWORKIN, CHAIRMAN

Exhibit A-1, Award of Arbitrator

AWARD

In the Matter of the Arbitration Between:

PIONEER RURAL ELECTRIC COOPERATIVE, INC., Piqua, Ohio

-and-

UTILITY WORKERS UNION OF AMERICA, AFL-CIO, LOCAL UNION NO. 469

I.

The Board of Arbitration finds and determines on the basis of the evidence adduced at the arbitration hearing, and consideration of documentary exhibits, and post hearing briefs, that the company's policy prohibiting certain types of "after-hours" work, or "moonlighting" on the part of its employees is reasonable, and within the recognized rights of management as set forth in Article X, of the Agreement;

II.

The evidence establishes that the company's policy was orally communicated to the grievant in 1973 at the time he was hired, and that said policy was set forth in written form in 1977, copies of which were distributed to the company's employees.

III.

The union is accorded the contractual right in each instance to challenge a plant rule, or policy unilaterally drafted by the company including the right to grieve the application of a rule on behalf of individual employees;

IV.

It is the judgment of a majority of the Board of Arbitration that the grievant be accorded an opportunity to determine within ten (10) days from the date of receipt of this Award whether he will agree to discontinue his outside business

activity as a condition of being reinstated to his employment, without loss of seniority but without reimbursement for any incidental loss of earnings.

AWARD SIGNED, ISSUED AND DATED BY THE CHAIRMAN, AT CLEVELAND, CUYAHOGA COUNTY, OHIO, THIS 24th DAY OF JUNE, 1981.

/s/ Harry J. Dworkin

HARRY J. DWORKIN, CHAIRMAN

/s/ Gene A. Potter

Union Designated Arbitrator Concurs with Items III & IV and Dissent to items I & II in the above Opinion and Award

/s/ Robert L. Roberts

Company Designated Arbitrator Concurs in the above Opinion and, Award

AFFIDAVIT OF DOUGLAS A. DOWTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUGLAS A. DOWTY — CASE NO. C-3-82-005

Plaintiff, — JUDGE RICE

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC., et al.

Defendants

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN ss:

Douglas A. Dowty, being first duly cautioned and sworn, does hereby state the following:

1. I am the plaintiff in the above captioned action and have personal knowledge as to all matters hereinafter referred to.

2. I have read the affidavit of Edward J. Coggins, Jr. submitted with defendant Utility Worker's Union's Memorandum in Reply to plaintiff Dowty's Supplemental Memorandum and recall the meeting in Zanesville of July 7, 1981 involving myself and the three Union officials, Larry Rench, Gene Potter and Edward J. Coggins, Jr.

3. At the July 7, 1981 meeting, I was advised that I would receive a formal and final copy of the Arbitration Award of Mr. Harry J. Dworkin by certified mail. I understood from this meeting with the Union officials of July 7, 1981 that the copy of the Arbitration Award to be sent to me by certified mail would be my formal, official notice of the decision and award of the Arbitration Panel.

4. At the meeting of July 7, 1981 with the Union officials, I was never given a copy of the Arbitration Decision and Award involved herein to read or keep. I did not receive a copy of the Arbitration Decision and Award until a copy was delivered to me by certified mail as promised in the meeting. I received that certified mail copy on July 10, 1981 in an envelope which also contained the original of a letter from Robert L. Roberts, a copy of which is attached hereto as Exhibit "A".

5. At the meeting of July 7, 1981, I was advised by Mr. Coggins that under the terms of the Arbitration Decision and Award, I could no longer perform any electrical wiring outside of my employment with Pioneer. To service and install electrical generators, it is essential to perform electrical wiring, as I had always done in connection with my outside business activity. The final, official copy of the Arbitration Decision and Award which I received on July 10, 1981 is the same as the copy submitted with the Memorandum in Reply described in paragraph 2 above, which contains no provision allowing me to perform service and installation of electrical generators as Mr. Coggins maintains in his affidavit.

6. I was not terminated by Pioneer Rural Electric Company on December 12, 1980. I remained employed with Pioneer until July 20, 1981, ten days after I received the letter attached hereto as Exhibit "A".

Further affiant sayeth naught.

/s/ Douglas A. Dowty

DOUGLAS A. DOWTY

SWORN TO AND SUBSCRIBED BEFORE ME THIS 19 DAY OF JULY 1983.

/s/ Thomas L. Davis

NOTARY PUBLIC

THOMAS L. DAVIS, Attorney-At-Law
NOTARY-STATE OF OHIO
My commission has no expiration date.
Section 147.C3 R.C.

Exhibit "A"

Pioneer Rural Electric Cooperative, Inc.

Phone (513) 773-2523

July 8, 1981

CERTIFIED MAIL

Mr. Douglas A. Dowty
P. O. Box 637
St. Paris, OH 43072

Dear Mr. Dowty:

Enclosed is a copy of the Arbitrator's Opinion and Award in the Matter of Arbitration between Pioneer Rural Electric Cooperative, Inc. and Utility Workers Union of America, AFL-CIO, Local Union No. 469, involving your formal grievance. I believ the Award to be self-explanatory.

If we do not receive your commitment in verification of the judgement within ten calendar days of receipt of this letter we shall effect your termination as of that date.

Sincerely yours,

PIONEER RURAL ELECTRIC COOPERATIVE, INC.

/s/ Robert L. Roberts

Robert L. Roberts
General Manager

RLR:jvd

Enclosure

cc: Mr. Larry Rench
President, Local 469, U.W.U.A.

Mr. Harry J. Dworkin
Attorney at Law
911 Public Square Building
Cleveland, OH 44113

Supreme Court, U.S.
FILED
DEC 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-694

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

REPLY BRIEF OF PETITIONER
In Support of Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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No. 85-694

In the Supreme Court of the United States

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DOUGLAS A. DOWTY,

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PIONEER RURAL ELECTRIC COOPERATIVE, INC., UTILITY WORKERS UNION OF AMERICA,

Respondents.

REPLY BRIEF OF PETITIONER
In Support of Petition for a Writ of Certiorari To the United States Court of Appeals For the Sixth Circuit

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Before addressing the arguments set forth in the opposing briefs submitted by each respondent, a few factual clarifications are in order. Within its Statement of the Case at pages 2 and 3 of respondent Union's Brief in Opposition, it is stated that on July 7, 1981, a Union official orally informed Dowty that he could continue to sell, install and service electric generators. The Union official at that time orally contradicted the terms of the actual arbitration award, appearing at page A20 of the appendix to respondent Union's brief. The written decision, appearing at pages A4 through A19 of respondent Union's appendix was not read at the meeting and petitioner did

not see it until he received his copies of the arbitration results on July 10, 1981. The last paragraph of the opinion, appearing at page A19 of respondent Union's appendix, contradicts the language of the actual award in that it appears not to prohibit outside business activity.

The point, however, is that with his copies of the decision and award received on July 10, 1981, petitioner received a termination letter from Pioneer stating that petitioner's position would be terminated within ten days unless he elected to comply with the mandate of the award and cease all outside business activity. It is for this reason that petitioner did not know of his injury until July 10, 1981. Union officials misrepresented the resolution of the issue at the heart of the arbitration. Obviously, the employer Pioneer, through its termination letter, intended to discharge petitioner unless he decided to terminate all outside business. *See* termination letter at page A24 of the appendix to respondent Union's Brief in Opposition. Then and only then did appellant learn of his injury so as to compel institution of the instant hybrid action.

I.

Conflict Among the Circuit Courts of Appeals

Curiously, both respondents take the position that the accrual rule adopted by the Sixth Circuit below is applied by all circuits. The position taken is tragically inaccurate from a reading of the cases. The Eleventh Circuit and Fifth Circuit, subsequent to this Court's decision in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983), looked to the time that the employee learned of his injury, not the time of discovery of the Union's breach of duties. *Benson v. General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983); *Farr v. H. K. Porter Co., Inc.*, 727 F.2d 502 (5th

Cir. 1984). There is a dramatic difference between the two rules in that one ignores the existence of injury and the other takes it into consideration. In fact, one of the decisions cited by both respondents uses an entirely different accrual rule which, again, was not the rule used by the Sixth Circuit in the case at bar. The court in *Craft v. Automotive, Petroleum & Allied Industries Employees Union, Local 618*, held that a hybrid action accrues "on the date the employee's grievance is finally rejected and his contractual remedies are exhausted." 784 F.2d 800, 803 (8th Cir. 1985). In summary, a statement that the circuits have universally adopted the accrual rule used by the Sixth Circuit herein is simply "not so".

II.

National Uniformity and the Importance of the Time of Accrual Question in Hybrid Actions

Both respondents take the position that all petitioner wants this Court to do is hold that a hybrid §301/fair representation action cannot accrue until an employee has received a copy of the written arbitration award. None of the Questions Presented by petitioner makes reference to this point and it ignores the true theme of petitioner's request for a writ of certiorari and the general rules this Court follows for consideration of certiorari petitions. Petitioner has advanced that due to the importance of national uniformity in the labor law area a single rule of accrual as of the time of discovery of injury should be adopted, as the rule adopted by the lower courts herein, accrual as of the time of the discovery of the Union's wrongful conduct only, fails to serve underlying federal labor law policies.

In fact, respondent Union implicitly admits that the rule petitioner advances is more appropriate by spending

a great portion of its opposing brief discussing the point at which petitioner Dowty knew or should have known of his injuries herein. The Sixth Circuit, however, considered only the issue of when petitioner learned of the Union's breach of its duty of fair representation. At best, all the Union's opposing brief shows is that a factual issue exists as to when petitioner learned of his injuries as a result of the wrongful conduct alleged in his complaint—something petitioner has asserted all along.

An injured employee considering the institution of a hybrid §301/fair representation action is given considerably less time than most other injured parties contemplating a lawsuit. The point at which the period of time begins to run in hybrid actions is thus doubly important. It is a balancing of all the competing interests, as this Court did in *DelCostello* when it decided the applicable limitations provision, which warrants consideration of the instant case on the merits.

CONCLUSION

For all of the foregoing reasons, petitioner Douglas A. Dowty respectfully prays that the Court issue a writ of certiorari as requested.

Respectfully submitted,

TED L. EARL, *Counsel of Record*
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